No. _____

In The
Supreme Court of the United States

JOHN PAUL GOSNEY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether *United States v. Monsanto*, 491 U.S. 600 (1989), and/or *Kaley v. United States*, 571 U.S. 320 (2014), should be overruled or at least modified.

II

If not inclined to reconsider *Monsanto* or *Kaley*, whether the Court should nonetheless vacate outright the *ex parte* restraint on the funds petitioner needs to retain trial counsel of choice or, at a minimum, remand for a hearing as to traceability, particularly when the government concedes that the restrained funds were neither listed in the indictment's forfeiture count nor presented to the grand jury for a probable cause determination.

PARTIES TO THE PROCEEDINGS

The petitioner, John Paul Gosney, Jr., is a defendant in the district court and the appellant in the Eleventh Circuit.

The respondent is the United States of America.

RELATED CASES

United States v. Gosney, 22-12049, 2023 WL 1434183 (11th Cir. Feb. 1, 2023). App.1-13.

United States v. Gosney, Case No. 22-80022-CR-CANNON (S.D. Fla. June 10, 2022) (Docket Entry #256) (order denying motion to vacate the *ex parte* restraining order). App.14-29.

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United States v. Gosney, Case No. 22-80022-CR-CANNON (S.D. Fla. June 10, 2022) (Docket Entry #256) (order denying motion to vacate the *ex parte* restraining order). App.14-29.

JURISDICTION

The Eleventh Circuit issued its decision on February 1, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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App.30-32.

STATEMENT OF THE CASE

Following the execution of a search warrant at his business premises in July 2021, petitioner John Paul Gosney, Jr. retained attorney Howard Srebnick of the law firm Black Srebnick to represent him. DE#172:2. Pre-indictment, Srebnick represented Gosney in sealed proceedings in response to three subpoenas served upon Gosney to appear before the grand jury. FGJ-21-01-MIA (S.D. Fla.); *see also* 21-13651 (11th Cir.) (sealed).

On February 7, 2022, a criminal complaint was filed against two alleged co-conspirators, Michael and Galina Rozenberg, accusing them of health care fraud and money laundering. DE#1. The complaint alleged that Medicare had been billed for unnecessary laboratory services that had been solicited by the Rozenbergs or their related entities, including a laboratory, Progenix Lab, LLC. Petitioner Gosney had yet to be charged or indicted in this conspiracy.

At the February 22, 2022, preliminary hearing of Michael Rozenberg, Health and Human Services ("HHS") Agent Brian Frank testified that $25 million in Medicare payments were made for genetic testing of more than 3,500 Medicare patient-beneficiaries. DE#170:68-69. For each test, the lab obtained from the patient-beneficiary's primary care physician a signed requisition form certifying the medical necessity of each test. DE#170:68,71. As of this hearing, HHS had spoken to only a "handful, six seven" (not even one percent) of the more than 3,500 physicians who had certified the tests as medically necessary, DE#170:71,

and had heard complaints about the veracity of the certifying physician or patient signatures for only "roughly ten, maybe more." DE#170:99-100. Statistically speaking, more than 99% of medical necessity certifications were signed and completed, without complaint.

Two days later, a multi-count indictment was returned against the Rozenbergs, petitioner Gosney, and seven others, alleging health care fraud, kickbacks and money laundering. The indictment alleges that the defendants billed Medicare for medically unnecessary diagnostic testing for an unidentified number of patients. DE#23:16-17. The indictment acknowledges that Medicare requires physician certifications of medical necessity as a precondition to payment. DE#23:3(¶7). But the indictment does not allege that the thousands of physicians who certified medical necessity were corrupt or otherwise failed to exercise independent medical judgment. The indictment alleges that a "Shell Lab Rule" limits the percentage of annual referrals of laboratory tests but makes no allegation that this rule was violated or generated any fraud proceeds.

The indictment alleges that certain named defendants—*not* including Gosney—"altered, forged, or back dated doctors' orders, or caused such doctors' orders to be altered, forged or backdated." DE#23:15(¶7). The indictment does not quantify how many orders were forged, how much Medicare paid for testing predicated upon forged orders, or how much, if any, of those proceeds were received by Gosney.

The indictment alleges that Gosney "acquired beneficial ownership interests of or managing control over laboratories," DE#23:15(¶9), "received kickbacks and bribes from independent clinical laboratories enrolled with Medicare . . . in exchange for referring Medicare beneficiaries and doctors' orders for genetic testing," DE#23:16(¶12), and "caused the submission of false and fraudulent claims to Medicare." DE#23:17(¶16). In conclusory fashion, the indictment alleges that Medicare paid tens of millions of dollars "for laboratory services that were not medically necessary and not eligible for reimbursement," DE#23:16-17(¶¶14–16), to entities supposedly related to Gosney as an alleged beneficial owner. DE#23:11(¶41).

The indictment lists only five specific reimbursed patient medical services as health care fraud; of these, three cardiomyopathy tests are charged against Gosney in amounts totaling $27,004 in reimbursements. DE#23:20. The indictment connects Gosney personally to a single $16,600 alleged kickback payment from Company A "through Metropolis Account 1, which constituted a kickback payment for Medicare beneficiary referrals." DE#23:25(¶11). Metropolis is a company owned by petitioner Gosney. Count 19 further alleges a transfer of $2 million from Metropolis Account 1 to Metropolis Account 2 as money laundering seven months prior to the indictment.

The indictment seeks forfeiture of health care fraud proceeds under 18 U.S.C. § 982(a)(7), fraud proceeds under 18 U.S.C. § 981(a)(1)(C), and money laundering forfeiture under 18 U.S.C. § 982(a)(1).

DE#23:30-32. The indictment identifies funds already seized from listed bank accounts which it identifies as "the property subject to forfeiture as a result of the alleged offenses," and certain real property, two of which are investment properties owned by Gosney. DE#23:32. The indictment further identifies as "substitute property" (*i.e.*, not traceable to the crimes charged) Gosney's residence. DE#23:32. The government filed a Notice of Lis Pendens as to each of Gosney's real properties. DE#53,55,56.

On February 28, 2022, Gosney made his initial appearance and was released on personal surety bonds. DE#67. Attorney Howard Srebnick, who had been representing Gosney pre-indictment, filed a temporary appearance as counsel. DE#66,69.

One week later, the government filed an *Ex Parte* Application for a Post-Indictment Protective Order "to restrain and enjoin all funds on deposit in account number [redacted] at Valley Bank, held in the name of Metropolis Unlimited, LLC (the 'Subject Asset')," DE#80:3, identified in the indictment as Metropolis Account 2. DE#23:10(¶36). That bank account was not named in the indictment's forfeiture allegations. Invoking the pretrial restraining order statute 21 U.S.C. § 853(e)(1)(A), and referencing the recent indictment, the government sought the protective order under seal and "*ex parte*, without notice or a hearing" pursuant to *United States v. Bissell*, 866 F.2d 1343, 1349 (11th Cir. 1989). DE#80:3. The application stated:

> Upon further investigation, the United States has uncovered an additional asset subject to

> forfeiture pursuant to 18 U.S.C. §§ 982(a)(7), 981(a)(1), and 982(a)(1). *Because such property was not listed in the Indictment or presented to the grand jury for a probable cause determination*, the United States submits, under seal, the attached agent's declaration to establish sufficient probable cause for the issuance of the requested protective order (attached hereto as Exhibit A).

DE#80:2 (emphasis added).

In a supporting declaration, FBI Special Agent Williams stated that federal agents had interviewed a single physician (of the thousands who had certified medical necessity for their respective patients). That Oregon physician recounted that in June 2021 he had received two faxes from Gentec Solutions (an entity not named in the indictment) requesting that he sign a lab requisition form for his patient to take a cardio test. The Oregon physician then received calls from a Gentec representative following up on the requisition form. The Oregon physician did not sign the requisition form, and Agent Williams did not allege that Medicare was ever billed anything in connection with this Oregon physician's patient. Agent Williams also addressed a former sales employee's description of sales practices with patients.

With regard to tracing Medicare payments, Agent Williams did not allege that any of the traced funds were related to medically unnecessary services. Instead, he alleged a violation of the so-called "Shell Lab Rule," DE#81:7-8(¶23), which limits to 30 percent "during the year in which the test is performed" the

number of tests that a laboratory can "reference out." 42 U.S.C. § 1395I(h)(5)(A). Agent Williams claimed that in 2020, Cergena Laboratories (identified in the indictment) received over $20 million from Medicare for cardio tests for over 2,800 beneficiaries and that "Medicare claims data shows that essentially all of the claims were billed using a modifier indicating that, in violation of the shell lab rule, another laboratory, not Cergena, actually performed the test." DE#81:8(¶23). Agent Williams then alleged that "there is probable cause to believe [Cergena] is a shell laboratory used solely to submit claims to Medicare." DE#81:8(¶24).

Agent Williams observed that $20 million from "shell lab" testing landed in a Cergena bank account, which he described as "proceeds from Medicare contractors tied to reimbursements for false and fraudulent claims Cergena submitted to Medicare." DE#81:8(¶26), Williams did not identify the "tied" contractors nor quantify the dollar amount of allegedly "false and fraudulent claims." Agent Williams traced a series of transfers from Cergena funds through other bank accounts, culminating in a $2,000,000 transfer on July 14, 2021 into the Valley Bank account in the company name Metropolis, of which "Gosney is the sole member." DE#31:8-10. From this alleged shell lab rule violation, he opined that "there is probable cause to believe that the [Valley Bank account] is subject to forfeiture." DE#81:10. As of the date of the indictment, on "February 25, 2022, the account had a balance of over approximately $818,230.30." DE#81:8(¶33). Although Agent Williams "confirmed that the balance in that account never fell below $0," DE#81:8(¶34), he provided

no other information regarding deposits in or withdrawals out of that account.

Most critically, violation of the so-called shell lab rule was not a charge in the indictment, which cited the rule in the preamble, DE#23:6-7, but did not allege any willful violation of the rule or that any proceeds were generated from violating the rule. The indictment's reticence was consistent with the prior testimony of Agent Frank at Michael Rozenberg's preliminary hearing during which Agent Frank admitted that "Medicare, CMS, was told every single time that a reference lab was doing the testing . . . And Medicare paid the claims" anyway. DE#170:91-92. The prosecutor himself cautioned against "giving [the alleged violation of the rule] substantial weight." DE#170:116.

Without affording Gosney notice or a right to be heard, the district court signed the government's proposed, sealed restraining order and entered it on the docket on March 7, 2022. DE#103. The government did not seek the pretrial restraint of assets of any of the other nine defendants.

Gosney filed a motion to vacate the protective order, asserting that he needed the funds in the restrained Valley Bank account to retain trial counsel of choice, Howard Srebnick. DE#172:11 (citing *Kaley v. United States*, 571 U.S. 320 (2014) and *Luis v. United States*, 578 U.S. 5 (2016)). Gosney's motion exposed the flaws in, and limits to, the prosecution's evidence that had surfaced at Michael Rozenberg's preliminary

hearing. Challenging the breadth of the government's restraint as against the entirety of the Valley Bank account, DE#172:6-7, Gosney argued that payment for testing ordered by a patient's independent, primary care physician (PCP) does not constitute fraud, absent fraud in the physician medical necessity certification, of which there was evidence as to only a handful even in dispute And he challenged Agent Williams's shell lab rule theory. DE#172:7 n.2.

Gosney's motion also emphasized that the government had conceded that the bank account "*was not listed in the Indictment or presented to the grand jury for a probable cause determination*," which is what prompted the government to "submit[ ], under seal, the . . . agent's declaration to establish sufficient probable cause for the issuance of the requested protective order" as alleged extrinsic evidence of tracing. DE#80:2 (emphasis added). "As a result," Gosney argued, there was no "grand jury determination tracing the specific property sought for forfeiture to a particular defendant or defendant offense." DE#172:8.

Gosney asked the district court to "vacate the *ex parte* restraint on Gosney's Valley Bank Account or, at a minimum, conduct a tracing hearing" as mandated by *Kaley*. DE#172:9. Insofar as the district court was to require as a precondition of a hearing a showing by Gosney that he needed access to the restrained asset to retain counsel of choice, Gosney proposed and the district court granted him leave to submit such financial information *ex parte*, under seal, DE#172:13, which he did. Gosney also urged that:

> Consistent with the Views Expressed in the Dissenting Opinions in *Kaley* and *Luis*, the Grand Jury's *Ex Parte* Finding of Probable Cause is Insufficient to Restrain Assets Needed to Retain Counsel of Choice; the Government Must Establish, at an Adversarial Hearing, a Substantial Likelihood of Proving the Forfeitability of the Restrained Assets.

DE#172:14.

On June 10, 2022, the district court denied the motion to vacate. App.14. The district court "assume[d] that Gosney's *ex parte* showing of financial need [ECF No. 238] satisfies the preliminary showing requirement for a pre-trial, post-restraint hearing on traceability." App.20. The court addressed the due process speedy trial "factors under *Barker v. Wingo*, 407 U.S. 514 (1972), as applied to criminal asset restraints, *see United States v. Bissell*, 866 F.2d 1343, 1353 (11th Cir. 1989)"—a forfeiture due process standard unique to the Eleventh Circuit—to consider whether any pretrial hearing was justified, App.15, declining to apply this Court's three-part due process standard set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) as requested by Gosney.[1] Applying *Barker*, the district court ruled that a trial then set for ten months away was a sufficient first opportunity for a criminal defendant to

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[1] On April 17, 2023, this Court granted certiorari to address the split in the Circuits over which test applies in a civil forfeiture case. *Culley v. Attorney General of Alabama, et al*., No. 22-585, ___ S.Ct. ___, 2023 WL 2959364 (Mem.) (April 17, 2023).

challenge the *ex parte* pretrial restraining order that would deprive him of funds needed to retain counsel of choice:

> In applying the *Barker* test to this case, the Court finds that a pre-trial, post-restraint hearing on the traceability of the restrained funds to the charged offenses is unwarranted. The first two *Barker* factors—the length and cause of the contemplated delay—do not weigh in favor of a pre-trial hearing in any significant way. The only factor that does is Gosney's timely assertion of his right, and that factor is outweighed significantly by the output of the prejudice calculus under the binding precedent of *Kaley* and in the context of Gosney's challenge.

App.28-29.[2]

Even though the *ex parte* government motion admitted no prior probable cause determination had been made as to the property and offered new extrinsic evidence of property tracing, the district court rooted its *Barker* "prejudice calculus" by citing the *Kaley* opinion's disapproval of "second-guessing" grand jury guilt determinations:

> In *Kaley*, the Supreme Court drew a distinction between (1) the grand jury's determination of probable cause to believe a defendant committed a crime and (2) the grand jury's determination that the assets subject to

[2] The district court has since continued the trial for another seven months, until July 2023.

> forfeiture are traceable to the charged crime. In doing so, the Supreme Court made clear that only the latter determination—which concerns a technical matter removed from the grand jury's core competence and function—may be subject to second-guessing prior to trial. Conversely, the former determination by the grand jury—that probable cause exists to believe a defendant perpetrated the offenses alleged based on the factual allegations supporting the grand jury's probable cause determination—is "conclusive" at this stage, i.e., not subject to "any review, oversight, or second-guessing" pending resolution of the case.

App.25 (citations omitted). The district court denied the motion to vacate, opining that:

> other than referencing the issue of whether the subject asset is "traceable to the crimes charged" in passing [ECF No. 172 p. 8; ECF No. 205 pp. 2, 4], *Gosney's arguments on the merits all reduce to a claim that neither he nor his co-defendants committed the charged crimes or obtained any significant amount of money from improper Medicare claims.* That determination, however, falls within the sole province of the grand jury.

App.27 (emphasis added).

Even though the government itself had described its *ex parte* application as a tracing showing, the court refused to consider any defense challenge to this extrinsic tracing evidence, or to permit a hearing into whether the newly restrained bank account was

tainted in whole or part. In particular, the district court refused to consider challenges to the extent of testing fraud or related proceeds, notwithstanding the prior government testimony offering no evidence to question thousands and substantially all (>99%) of prior physician medical certifications. Instead, the district court focused on the alleged scope of the conspiracy and the indictment's allegation in Count 19 that $2 million was allegedly laundered into the Metropolis 2 bank account seven months before the account was restrained. App.27.

Prohibited from using his restrained assets to retain counsel of choice, Gosney filed a notice of appeal, DE#258, and moved the district court to continue his June 23, 2022, arraignment pending a decision from the Eleventh Circuit, DE#260, which the district court denied. DE#261. "Understanding that [the district court] expect[ed] Gosney to retain trial counsel (even if not his counsel of choice)," Gosney requested two weeks to make financial arrangements to retain other trial counsel, while simultaneously pursuing his appeal to the Eleventh Circuit. DE#262:1-2. The district court accommodated this request but warned that "[n]o further extensions of this deadline will be granted." DE#263.

Gosney arranged for Black Srebnick associate Alyssa Silvaggi to timely file an appearance as trial counsel, while reserving his right to pursue his appeal from the denial of his motion to vacate the *ex parte* restraining order insofar as it deprives him of the financial ability to retain his trial counsel of choice. DE#269.

On appeal, Gosney argued for vacatur of the *ex parte* restraining order outright, or remand for a pretrial tracing hearing, because the order restrains "legitimate, untainted assets needed to retain counsel of choice[, which] violates the Sixth Amendment." *Luis v. United States*, 578 U.S. 5, 10 (2016). Observing that the government conceded that Gosney's Valley Bank account "was not listed in the Indictment or presented to the grand jury for a probable cause determination," DE#80:2, Gosney argued that the omission was fatal to the validity of the district court's order. *See United States v. Kaley*, 677 F.3d 1316, 1327 (11th Cir. 2012) ("Without the grand jury's probable cause determination and the court's approval, the prosecution is not free to restrain anything."), *aff'd and remanded*, 571 U.S. 320 (2014). App.8. Gosney argued that he was entitled to an adversarial pretrial hearing to challenge the propriety of the restraint, even if limited to whether there was a sufficient "nexus between those assets and the charged crime." *Kaley*, 677 F.3d at 1327. App.12.

And, given the views expressed by the dissenting Justices in *Kaley* and *Luis*, as well as multiple judges of the Eleventh Circuit, Gosney argued that he should be permitted to also challenge whether there is probable cause that he committed an offense permitting forfeiture; and the government should be required to establish, at an adversarial hearing, a substantial likelihood of proving the forfeitability of the restrained assets. App.13. *See Luis*, 578 U.S. at 51-52 (Kagan, J., dissenting) ("[I]t is quite another thing to say that the

Government may, prior to trial, freeze assets that a defendant needs to hire an attorney, based on nothing more than 'probable cause to believe that the property will ultimately be proved forfeitable.'"); *Kaley v. United States*, 571 U.S. 320, 341 (2014) (Roberts, C.J., joined by Breyer and Sotomayor, JJ., dissenting) ("[T]he Government may effectively remove a defendant's primary weapon of defense—the attorney he selects and trusts—by freezing assets he needs to pay his lawyer. That ruling is not at issue. But today the Court goes further, holding that a defendant may be hobbled in this way without an opportunity to challenge the Government's decision to freeze those needed assets. I cannot subscribe to that holding and respectfully dissent."); *United States v. Kaley*, 579 F.3d 1246, 1259-60 (11th Cir. 2009) ("If we were writing on a blank slate today . . . the [defendants] would be entitled to a pretrial hearing on the merits of the protective order."); *Kaley*, 677 F.3d at 1331 (Edmondson, J., concurring) ("To ask the government to respond to a challenge on probable cause that the charged crime actually occurred is not to place on the government a heavy burden.").

The Eleventh Circuit affirmed. App.1. As an initial matter, the Eleventh Circuit reminded that "[t]he Supreme Court has held that a pretrial restraint of assets is constitutionally permissible when it is 'based on a finding of probable cause to believe that the assets are forfeitable.'" App.8. (quoting *United States v. Monsanto*, 491 U.S. 600, 615 (1989)). The Eleventh Circuit rejected Gosney's argument that "the district court

wasn't authorized to issue an order restraining his account just because the account wasn't specifically listed in the non-exhaustive forfeiture allegations section of his indictment." App.8. Rather, the court concluded that "[i]n light of what was presented to the district court, combined with the indictment's clear notice that any property involved in or traceable to the charged offenses would be subject to criminal forfeiture upon a defendant's conviction, the district court's restraint of the account was proper under section 853(e)." App.10.

"On the issue of whether Gosney is entitled to a post-indictment, pretrial hearing on the legality of the restraint on his property," the court held that it was "bound by [its] decision in *Bissell*," App.10, which applies the four-factor speedy trial "balancing test in *Barker*." App.10. Acknowledging that the district court found that the first three factors "weighed neutrally or marginally in Gosney's favor," the Eleventh Circuit framed the issue as "whether the district court erred in finding that Gosney wasn't unduly prejudiced by the restraint on his assets." App.11.

Quoting this Court's decision in *Kaley*, the court acknowledged that:

> a pretrial asset restraint must be supported by two probable-cause determinations: "There must be probable cause to think (1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime."

App.11. The Eleventh Circuit understood *Kaley* to hold that:

> a defendant seeking to lift a pretrial asset restraint has no right to a hearing to contest the first determination—the grand jury's finding of probable cause to believe that the defendant committed the crimes charged. . . . [O]nly the second determination may be challenged before trial. This is because "the tracing of assets is a technical matter," whereas the grand jury's determination of probable cause to support criminal charges is part of its "core competence and traditional function" and thus "conclusive."

App.11.

The court echoed the district court's view that, "[a]lthough couched as a traceability challenge . . . Gosney's argument constitutes an impermissible attack on the grand jury's determination of probable cause that he committed an offense permitting forfeiture." The court emphasized that Gosney "doesn't argue that the account's funds are from sources unrelated to his alleged conduct," that Gosney "cites testimony from his co-defendants' preliminary hearing to show the absence of fraud and argues that the scheme didn't constitute fraud because the billings were for medically necessary services authorized by physicians," and that Gosney's argument is "that 'the revenues do not constitute proceeds of a fraud' because the conduct with which he is charged doesn't actually constitute fraud." App.12-13. Thus, the court concluded

that Gosney's argument "is squarely at odds with the factual allegations in the indictment and thus is foreclosed by *Kaley*." App.13.

Finally, the Eleventh Circuit observed that:

> As a fallback, Gosney urges us to overturn *Bissell* and "conclude that, in assessing the need for a hearing, Gosney may challenge not only the nexus prong, but the guilt prong as well." Even if we were at liberty to overturn our binding precedent, as Gosney suggests, it's not *Bissell* that compels our conclusion. Rather, it's the Supreme Court's *Kaley* opinion, which mandates that Gosney has "no right to relitigate" the "grand jury's prior determination of probable cause to believe [he] committed the crimes charged." And, "under our system of vertical precedent, we are bound to apply *Kaley* until it is overruled, receded from, or in some other way altered by the Supreme Court."

App.13 (citations omitted).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In her dissenting opinion in *Luis v. United States*, Justice Kagan wrote:

> I find *United States v. Monsanto*, 491 U.S. 600 (1989), a troubling decision. It is one thing to hold, as this Court did in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), that a convicted felon has no Sixth Amendment right to pay his lawyer with funds adjudged forfeitable. Following conviction, such assets belong to the Government, and "[t]here is no constitutional principle that gives one person the right to give another's property to a third party." *Id*. at 628. But it is quite another thing to say that the Government may, prior to trial, freeze assets that a defendant needs to hire an attorney, based on nothing more than "probable cause to believe that the property will ultimately be proved forfeitable." *Monsanto*, 491 U.S. at 615. At that time, 'the presumption of innocence still applies,' and the Government's interest in the assets is wholly contingent on future judgments of conviction and forfeiture. *Kaley v. United States*, 571 U.S. ___ (2014). I am not altogether convinced that, in this decidedly different circumstance, the Government's interest in recovering the proceeds of crime ought to trump the defendant's (often highly consequential) right to retain counsel of choice.

> But the correctness of *Monsanto* is not at issue today. Petitioner Sila Luis has not asked this Court either to overrule or to modify that decision; she argues only that it does not answer the question presented here. And because Luis takes *Monsanto* as a given, the Court must do so as well.
>
> *On that basis*, I agree with the principal dissent that *Monsanto* controls this case. Because the Government has established probable cause to believe that it will eventually recover Luis's assets, she has no right to use them to pay an attorney.

578 U.S. 5, 51-52 (2016) (Kagan, J., dissenting) (emphasis added).

I.

The Court Should Overrule or Modify *Monsanto* and/or *Kaley v. United States.*

In *United States v. Monsanto*, 491 U.S. 600 (1989), a 5-4 decision, this Court held that 21 U.S.C. § 853 "authorizes a district court to enter a pretrial order freezing assets in a defendant's possession, even where the defendant seeks to use those assets to pay an attorney," and that "such an order is permissible under the Constitution." *Id*. at 602. The defendant in *Monsanto* was subject to an *ex parte* restraining order entered under Section 853 and claimed that the order interfered with his ability to pay for counsel; the district court subsequently held a four-day hearing and concluded that the government "had 'overwhelmingly established a

likelihood' that the property in question would be forfeited at the end of the trial." *Id*. at 604-05. The defendant proceeded to trial, where he was represented by a court-appointed attorney. *See id*. at 605.

The *Monsanto* majority relied on *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), to reject the argument that the Fifth and Sixth Amendments "require[] Congress to permit a defendant to use assets" that are forfeitable under the statute "to pay that defendant's legal fees." *Monsanto*, 491 U.S. at 614.

In *Caplin & Drysdale*, which was decided the same day as *Monsanto* and involved a defendant who sought to pay attorneys' fees out of assets forfeited after a guilty plea, the Court concluded both that Section 853 is not "invalid under the Due Process Clause of the Fifth Amendment" and that "there is a strong governmental interest in obtaining full recovery of all forfeitable assets * * * that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." *Id*. at 619, 625-26, 631-34.

Monsanto considered a constitutional issue that was not directly presented in *Caplin & Drysdale*: whether the government may "freez[e] the assets in question before [the defendant] is convicted * * * and before they are finally adjudged to be forfeitable." *Monsanto*, 491 U.S. at 615. The Court concluded that "assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." *Id*. *Monsanto* did not consider, however, "whether a

hearing was required by the Due Process Clause" or whether the hearing that was held "was an adequate one." 491 U.S. at 615 n.10. The Court explained that such consideration was not called for because the government had "prevailed in the District Court notwithstanding the hearing" and the court of appeals had not addressed procedural due process. *Id*.

Dissenting from the majority opinions in both *Monsanto* and *Caplin & Drysdale*, Justice Blackmun (joined by Justices Brennan, Marshal and Stevens) echoed the sentiments of "[t]hose jurists who have held forth against the result the majority reaches in these cases [who] have been guided by one core insight: that it is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial." 491 U.S. at 635. As a matter of statutory construction, the dissenters would have "interpreted [Section 853] to avoid [the constitutional problem of] depriving defendants of the ability to retain private counsel" by construing the statute to not reach legitimate attorney's fees at all. 491 U.S. at 637. But the *Monsanto* majority "decided otherwise." 491 U.S. at 644.

As a matter of constitutional analysis, the dissenters rejected the majority's emphasis on the "relation-back provision, § 853(c), which employs a legal fiction to grant the Government title in all forfeitable property as of the date of the crime." *Id.* at 652. "The Government's interest in the assets at the time of their restraint is no more than an interest in safeguarding fictive property rights, one which hardly weighs at all against the defendant's formidable Sixth Amendment right to retain counsel for his defense." *Id*. at 653.

Compare United States v. Parcel of Land Known as 92 Buena Vista, 507 U.S. 111, 128 (1993) (relation back inapplicable prejudgment).

Significantly, as explained above, the district court in *Monsanto* had held a four-day adversarial evidentiary hearing at which the government "had 'overwhelmingly established a likelihood' that the property in question would be forfeited at the end of the trial," *id*. at 604-05—not just mere probable cause—and yet the dissenting justices deemed that government showing insufficient to outweigh the defendant's Sixth Amendment rights. Indeed, the *Monsanto* majority's proclamation that "assets in a defendant's possession may be restrained . . . based on a finding of *probable cause* to believe that the assets are forfeitable," *id.* at 615 (emphasis added), was arguably dicta, given the finding of the district court of an overwhelming likelihood of success. *Id.* at 615 n.10 ("[G]iven that the Government prevailed in the District Court notwithstanding the hearing, it would be pointless for us now to consider whether a hearing was required by the Due Process Clause. Furthermore, because the Court of Appeals, in its en banc decision, did not address the procedural due process issue, we also do not inquire whether the hearing—if a hearing was required at all—was an adequate one.").

When *Kaley* later came before the Court from the Eleventh Circuit, a main bone of contention was the government's claim that the speedy trial test in *Barker v. Wingo*, 407 U.S. 514 (1972), rather than the due process test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), should determine (deny) the Kaleys' due process right

to an adversarial hearing. *See* Kaleys' Petition for Writ of Certiorari at 29-30 & 39; Kaleys' Merits Brief at 33-50. In this Court, the government abandoned the *Barker* test altogether and argued for the first time that *Medina v. California*, 505 U.S. 437 (1992), provides the appropriate framework.[3] As the battle lines were drawn, the question before the Court was more about whether the Kaleys would get any adversarial, evidentiary hearing at all and less about what the burden of proof would be at the requested hearing. But the Kaleys were doomed, the Court held, because they did not dispute that in *Monsanto,*

> [r]elying on *Caplin & Drysdale*, we reasoned: "[I]f the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, *after probable cause is adequately established*, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial." *Ibid.* So again: With probable cause, a freeze is valid.
>
> *The Kaleys little dispute that proposition*; their argument is instead about who should have the last word as to probable cause.

571 U.S. at 327 (emphasis added).

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[3] The Court "decline[d] to address those arguments, or to define the respective reach of *Mathews* and *Medina,*" concluding that "[e]ven if *Mathews* applied here—even if, that is, its balancing inquiry were capable of trumping this Court's repeated admonitions that the grand jury's word is conclusive—the Kaleys still would not be entitled to the hearing they seek." 571 U.S. at 334.

The "combination" of (1) the Court's "[holding] in *Monsanto* that the probable cause standard governs the pre-trial seizure of forfeitable assets, even when they are needed to hire a lawyer" and (2) the "corollary of that standard: A defendant has no right to judicial review of a grand jury's determination of probable cause to think a defendant committed a crime," according to the Court, "signal[ed] defeat for the Kaleys because, in contesting the seizure of their property, they seek only to relitigate such a grand jury finding." 571 U.S. at 333; *see also id.* at 337 ("And yet *Monsanto* held, crucially for the last part of our *Mathews* analysis, that an asset freeze depriving a defendant of that interest is *erroneous* only when unsupported by a finding of probable cause.").

In the penultimate paragraph of Justice Kagan's opinion for the *Kaley* Court she wrote:

> When we decided *Monsanto*, we effectively resolved this case too. If the question in a pretrial forfeiture case is whether there is probable cause to think the defendant committed the crime alleged, then the answer is: whatever the grand jury decides. . . . Congress could disapprove of *Monsanto* itself and hold pretrial seizures of property to a higher standard than probable cause. But the Due Process Clause, even when combined with a defendant's Sixth Amendment interests, does not command those results. Accordingly, the Kaleys cannot challenge the grand jury's conclusion that probable cause supports the charges against them. The grand jury gets the final word.

571 U.S. at 342.

Justice Kagan concluded, in other words, that the grand jury provides all the process that is due a defendant whose assets, traceable to the conduct alleged, are later restrained, even though the grand jury affords no opportunity to be heard—a proposition of law that drew a dissent from Chief Justice Roberts (joined by Justices Breyer and Sotomayor).[4] Notably, the Chief Justice, like Justice Kagan, described the probable cause standard as the "holding" of *Monsanto* and, like Justice Kagan, also noted that the Kaleys "[did] not challenge that holding here." 571 U.S. at 345.

Two years later, in *Luis v. United States*, the Court addressed a different statute (18 U.S.C. § 1345) that authorized the restraint of both tainted and untainted

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[4] *Kaley* also sparked a debate by commentators. *E.g.*, Chanakya Sethi, The Big, Bad Freeze, Slate (Feb. 26, 2014) ("But I would have hoped the court would have seen fit to limit the damage . . . by giving criminal defendants, who are up against the awesome power of the state, a fair hearing before stripping them of their primary means of defending themselves. The Constitution should demand no less."); Radley Balko, Astonishingly Awful Supreme Court Decision Lets the Government Seize All Your Assets before Trial, Wash. Post (Feb. 27, 2014) (quoting a commentator: "what about due process, the opportunity for full and fair litigation of a disputed issue? Silly rabbit, tricks are for kids. Once the grand jury issued an indictment, there is nothing left to litigate."); Lauren-Brooke Eisen, *Kaley v. United States*: A "Frightening" Ruling, Brennan Center for Justice (Mar. 4, 2014) ("This could greatly impact the ability of defendants to exercise their sixth amendment right to counsel, and can cause undue hardship to those who have yet to be found guilty of a crime."); Leading Case: *Kaley v. United States*, 128 Harv. L. Rev. 261 (Nov. 10, 2014) ("[T]he opinion may cause harm by reducing the perceived legitimacy of the criminal justice system and eliminating a check on prosecutorial discretion.").

assets. Recall that in both *Monsanto* and *Caplin & Drysdale* the defendant proposed to pay his lawyer with drug money; and in *Kaley* the defendants did not contest that the restrained assets were traceable to the conduct alleged in the indictment. As far as the government was concerned, however, because there was probable cause to believe that Luis was guilty, and because the indictment sought forfeiture of tainted assets that Luis had dissipated, a court could, consistent with the expected outcome of the criminal prosecution, enjoin her pretrial from spending even legitimately earned "clean" funds on legal fees because those funds would later be needed to satisfy the expected criminal judgment. In the government's view, Luis was already effectively indigent—even if she owned untainted assets sufficient to retain counsel—because in the future the government would succeed in forfeiting both her tainted and untainted assets.

Against this backdrop, the Court heard argument in *Luis*. Right out of the box, the Court pressed Luis for a distinction between spending tainted versus untainted assets for counsel of choice. Chief Justice Roberts asked, "What do you do about *Monsanto*? So what is the logic that says it doesn't violate the Sixth Amendment if it's tainted funds, but it does if it's untainted funds?" Transcript of Oral Arg. at 3-4. Justice Scalia posited:

> That seems to me not a very persuasive line. You're relying on property law. What you're saying is the government can take away all your money if it's tainted, if there is probable

> cause to believe that it's tainted, right? It can take away all of your money if there is a judgment. But it can't take away all of your money if there's simply probable cause to believe that you're going to owe this money.

Id. at 20. Reviving the well-worn bank robber hypothetical, Justice Kagan proposed two parallel scenarios:

> One is the one that *Monsanto* talked about where, yeah, a bank robber goes in and he has a pile of money now. And *Monsanto* says, you know, even though he wants to use that money to pay for an attorney, too bad. Now a bank robber goes in, he has a pile of money, he puts it into a separate bank account, he uses that bank account to pay his rent, to pay other expenses, and he uses the money that would have gone for the rent and other expenses to pay a lawyer.
>
> Why should the two cases be treated any differently for Sixth Amendment purposes?

Id. at 3-4. Apparently unpersuaded that the tainted-versus-untainted distinction makes a constitutional difference, Justice Kagan asked the deputy solicitor general:

> [S]uppose the Court is just uncomfortable with the path we started down the road on in *Monsanto*? And you might be right that it just doesn't make sense to draw a line here, but it leaves you with a situation in which more and more and more we're depriving people of the

> ability to hire counsel of choice in complicated cases. And so what should we do with that intuition that *Monsanto* sent us down the wrong path?

Id. at 35-36.

Issued after the passing of Justice Scalia, the *Luis* opinion was announced by Justice Breyer for a four-justice plurality including Chief Justice Roberts, Justice Ginsburg, and Justice Sotomayor proclaiming that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." 578 U.S. at 10.

Concurring in the judgment, Justice Thomas agreed with the plurality's proclamation, *id.* at 25, while rejecting the plurality's balancing approach. *Id.* at 33. In Justice Thomas's view, both the text and history of the Sixth Amendment "implies the right to use lawfully owned property to pay for an attorney. Otherwise the right to counsel—originally understood to protect only the right to hire counsel of choice—would be meaningless." *Id.* at 25.

Justice Kennedy (joined by Justice Alito) filed a dissenting opinion, concluding that the government's interest in potentially forfeiting both tainted and untainted assets is the same, so, under *Monsanto* and *Caplin & Drysdale*, the restraint of either class of assets is constitutional:

> the assets restrained before conviction in *Monsanto* were on the same footing as the assets restrained here: There was probable

> cause to believe that the assets would belong to the Government upon conviction. But when the court issued its restraining order, they did not. The Government had no greater ownership interest in Monsanto's tainted assets than it has in Luis' [untainted] substitute assets.

Id. at 40, 42. Nothing in *Monsanto* or *Caplin & Drysdale*, according to Justice Kennedy, "depended on the assets being tainted or justifies refusing to apply the rule from those cases here." *Id.* at 44.

Justice Kagan dissented on the basis that "the correctness of *Monsanto* is not at issue today," that "Luis has not asked this Court either to overrule or to modify that decision," and that because "Luis takes *Monsanto* as a given," she "agreed with the principal dissent that *Monsanto* controls this case." But Justice Kagan openly expressed her discomfort with *Monsanto*, which she characterized as a "troubling decision." 578 U.S. at 51-52. *See ante* at 19. "[Much as [she] sympathize[d] with the plurality's effort to cabin *Monsanto*," Justice Kagan shared Justice Kennedy's view that "the Government's and the defendant's respective legal interests in [tainted and untainted] property, prior to a judgment of guilt, are exactly the same: The defendant maintains ownership of *either* type, with the Government holding only a contingent interest." 578 U.S. at 52-53 (emphasis added). Thus, Justice Kagan, the author of *Kaley*, felt constrained by *stare decisis* to dissent in *Luis* rather than concur in the opinions of either Justice Breyer or Justice Thomas.

Five justices in the *Luis* majority stated that the pretrial restraint of untainted assets is unconstitutional when needed to retain counsel of choice. The three dissenting justices stated that tainted and untainted assets stand on equal constitutional footing (Justice Kennedy: "same footing"; Justice Kagan: "exactly the same"). If now bound by the holding in *Luis as to untainted assets*, then presumably the dissenting justices would, following their own logic of equivalency, conclude that the pretrial restraint of tainted assets would also be unconstitutional—but for the earlier decisions in *Monsanto* and *Caplin & Drysdale*. The fortuity that the restraint of tainted assets came before the Court first, therefore, has generated the contradictions laid bare by Justice Kagan in her dissent. Had the Court first confronted the restraint of untainted assets in *Luis*, perhaps *Monsanto* and *Caplin & Drysdale* would have been decided differently.

Even if it is too much to ask that the Court overrule *Monsanto* altogether and hold that the Government cannot restrain pretrial a defendant's allegedly tainted assets needed to retain counsel of choice—no matter how strong a case the government has—Justice Kagan's discomfort with the path *Monsanto* has taken the Court should at least prompt a harder look at one of its key assumptions: that probable cause is a sufficiently rigorous standard to uphold pretrial restraints that interfere with the retention of counsel.

At oral argument in *Kaley*, Justice Scalia posited:

> Why? Why do we have to decide it that way? I mean, I don't like casting into doubt the judgment of the grand jury, but why couldn't we say that when you're taking away funds needed for hiring a lawyer for your defense, you need something more than probable cause? Couldn't we make that up? . . . And then say due process requires more than probable cause?

Tr. Oral Arg. at 30-31. Indeed, before this Court decided *Monsanto*, several lower courts had applied a standard higher than probable cause. *See, e.g.*, *United States v. Monsanto*, 836 F.2d 74, 84 (2d Cir. 1987) (requiring "an adversarial hearing, at which the government has the burden to demonstrate the likelihood that the assets are forfeitable."), *on reh'g*, 852 F.2d 1400 (2d Cir. 1988), *rev'd*, 491 U.S. 600 (1989), and *vacated*, 924 F.2d 1186 (2d Cir. 1991); *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981) ("[T]he government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty . . . and two, that the profits or properties at issue are subject to forfeiture. . . . In addition, these determinations must be made on the basis of a full hearing; the government cannot rely on indictments alone."); *see also* Rule 65, Fed. R. Civ. P.

This higher standard of proof would reconcile the anomaly created by *Kaley*'s premise that the grand

jury provides all the process due when property is restrained by the return of an indictment. After all, the Fifth Amendment provides a federal defendant both the right to indictment by grand jury and the right to due process of law when deprived of property. In the context of the deprivation of property, due process has always contemplated a right to be heard "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), if not before the deprivation, then very soon after. There is no more meaningful time for the Sixth Amendment than post-indictment, pretrial. There is no reason to believe that one of those Fifth Amendment rights (grand jury approval of indictment) could supplant the other (right to be heard when it matters most).

To be sure, the Fifth Amendment right to indictment by grand jury is neither synonymous nor co-extensive with the Fifth Amendment's guarantee of due process, for the "grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime." *Kaley*, 571 U.S. at 328. The right to grand jury approval does not include even the opportunity to be heard, the hallmark of due process. While many remain skeptical, even cynical, about the potency of the right to have a grand jury vet a proposed indictment, two is still greater than one, so whatever protections the Fifth Amendment Grand Jury Clause theoretically provides in addition to the Fifth Amendment Due Process Clause, the sum of those protections should at

least equal, if not exceed, the protections afforded by either one alone.

In the context of an indictment authorizing the restraint of property, however, *Kaley* produces exactly the opposite result: It allows the Fifth Amendment right to indictment by grand jury to diminish—if not altogether supplant—the independent and additional Fifth Amendment due process right to be heard promptly and when it matters, ordinarily triggered by a deprivation of property. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). This subtraction by addition devalues a third constitutional right—for without even limited judicial review of the property restraint, defendants are prohibited from using their funds to exercise their Sixth Amendment right to retain counsel of choice at trial to help establish their innocence.

This also creates "legal dissonance," *Kaley*, 571 U.S. at 331, between the due process rights afforded a defendant in federal versus state court. Whereas the Fifth Amendment's Due Process Clause mirrors the Fourteenth Amendment's, the Fourteenth does not contain a Grand Jury Clause, and "the Court has never held that federal concepts of a 'grand jury,' binding on the federal courts under the Fifth Amendment, are obligatory for the States." *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972). Defendants in state court may be prosecuted by information rather than indictment without violating the Constitution. *Hurtado v. California*, 110 U.S. 516, 534-35, 538 (1884). Charged by an information that restrains his property, a defendant

in state court still can invoke his Fourteenth Amendment due process right to a prompt, post-deprivation adversarial hearing on the restraint on property needed to retain counsel. A defendant indicted in federal court, however, is denied that hearing because the federal grand jury has "the last word as to probable cause." *Kaley*, 571 U.S. at 327.

It is worth recalling that in the same term the Court decided *Monsanto* and *Caplin & Drysdale*, it decided *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), which addressed what process must attend a pretrial asset seizure implicating First Amendment rights. In an opinion authored by Justice White, the author of *Monsanto* and *Caplin & Drysdale*, *Fort Wayne Books* unanimously held that the government must show more than "mere probable cause" to seize the alleged proceeds and instrumentalities of crime where the seizure chills freedom of speech. *Id.* at 66; *id.* at 68 (Blackmun, J., joining majority's Part III); *id.* at 70 (O'Connor, J., joining majority's Part III); *id.* at 83 (Stevens, J., dissenting on other grounds). Surely, legal advocacy against the government constitutes protected political speech, the First Amendment's core concern. The power to veto an adversary's choice of counsel is the power to suppress speech and stifle public debate on government actions, no less so than the seizure of pornographic books and films at issue in *Fort Wayne Books*.

While an attorney's speech in his clients' service can be regulated, the Court has held that the First Amendment also protects it. *See Gentile v. State Bar of*

Nevada, 501 U.S. 1030, 1034 (1991) (plurality); *id.* at 1075 (majority); *id.* at 1082 (O'Connor, J., concurring). Moreover, that case held that:

> The [First Amendment vagueness] inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government.

Id. at 1051.

The combination of the Sixth Amendment right to use untainted assets to retain counsel (*Luis*), with the First Amendment right to challenge government actions through counsel (*Gentile*), creates a sufficiently compelling constitutional interest to justify reconsideration of whether the government should be permitted to effect a "preconviction restraint and postconviction forfeiture [of] those assets a defendant needs to retain private counsel for his criminal trial." *Monsanto*, 491 U.S. at 642 (Blackmun, J., dissenting); and even if so, whether probable cause is an adequate standard upon which to authorize such pretrial restraints without any adversarial testing.

II.

If not inclined to reconsider *Monsanto* or *Kaley*, the Court should nonetheless vacate outright the *ex parte* restraint on the funds petitioner needs to retain trial counsel of choice or, at a minimum, remand for a hearing as to traceability.

In the court below, "Gosney argue[d] that the district court wasn't authorized to issue an order restraining his account because the account wasn't specifically listed in the non-exhaustive forfeiture allegations section of his indictment." App.8. The Eleventh Circuit acknowledged that it had previously "noted that the prosecution can't restrain assets 'without the grand jury's probable cause determination and the court's approval.' *Kaley II*, 677 F.3d at 1327." App.8. But it retreated from that proclamation by explaining that:

> We never specified that a grand jury's probable cause determination must appear in a particular part of the indictment, nor did we preclude district courts from making their own post-indictment probable cause determinations.

App.9. That conclusion does not square with the observation of the Chief Justice that "by listing property in the indictment and alleging that it is subject to forfeiture—*as required to restrain assets before trial under § 853(e)(1)(A)*—the grand jury found probable cause to believe those assets were linked to the charged offenses. . . ." *Id.* at 346-47 (dissenting opinion)

(emphasis added). To the extent that the omission is, as Gosney argued below, "fatal to the validity of the district court's order," App.8, the restraint should be vacated outright.

Alternatively, this Court should remand for a tracing hearing. As the *Kaley* majority acknowledged, "tracing of assets is a technical matter far removed from the grand jury's core competence and traditional function." *Kaley*, 571 U.S. at 331 n.9. Here, the government admitted that Gosney's bank account "was not listed in the Indictment or presented to the grand jury for a probable cause determination," DE#80:2, which was its justification for introducing extrinsic evidence (Agent Williams's declaration) to seek the *ex parte* restraining order. The government did not ask to relitigate the grand jury findings but rather to make a new probable cause finding based upon the agent's evidence.

The Eleventh Circuit itself recognized that the grand jury's work alone did not sustain the restraint: "The indictment's allegations, *in conjunction with the FBI agent's declaration*, established probable cause that the funds in the account would be forfeitable upon Gosney's conviction." App.9 (emphasis added). Still, the Eleventh Circuit declined to remand even for a tracing hearing because it viewed Gosney's motion as "an impermissible attack on the grand jury's determination of probable cause that he committed an offense permitting forfeiture." App.12. Admittedly, Gosney's "attack" included a challenge to probable cause, invited, Gosney submits, by the government's reliance on Agent

Williams's post-indictment declaration to support the restraint.

Whereas the indictment alleged a fraud scheme based on lack of medical necessity, Agent Williams's declaration instead relied exclusively on tracing what he called "fraud proceeds" generated by violation of the shell lab rule—a theory not charged in the indictment and contradicted by the testimony of Agent Frank at the preliminary hearing because Cergena disclosed to Medicare that it was billing for tests it had referred to other labs. Disclosure and acceptance, of course, is not fraud, nor was it so alleged in the indictment as to the shell lab regulation. In this post-indictment, pretrial context, subjecting an agent tracing declaration to adversarial testing—even if probable cause is questioned—does not conflict with the traditional or actual role of the grand jury, especially with a public record (a preliminary hearing) already created by the government.

CONCLUSION

The petition should be granted.

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